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IN THE

Supreme Court of the United States

October Term, 1959.

No. 524

NICOLA PANICHELLA,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent,

v.

WARNER BROTHERS PICTURES, INC., a Corporation.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Nicola Panichella, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on June 12, 1959. An order denying rehearing was filed on July 14, 1959.

OPINIONS OF THE COURT BELOW.

The opinion of the District Court for the Western District of Pennsylvania is reported at 167 F. Supp. 345 (W. D. Pa., 1958) (Appellant's Appendix 117a). The opinion of the Court of Appeals for the Third Circuit is recorded in 268 F. 2d 72 (*infra*, p. 1a). The order of the court on petition for rehearing was dated July 14, 1959 and is unreported (*infra*, p. 9a).

JURISDICTION.

The judgment of the Court of Appeals was entered on June 12, 1959 (*infra*, p. 8a). The order denying rehearing was entered on July 14, 1959 (*infra*, p. 9a). On October 7, 1959, Mr. Justice Brennan, upon application of the petitioner, extended the time within which to file petition for certiorari to November 13, 1959 (*infra*, p. 10a). The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Where a railroad worker is injured in the course of his employment for the railroad, but on the premises of Warner Company, a third party, is a general release between the injured worker and Warner a bar to an action by the worker against the railroad, where the railroad did not participate in the settlement; did not contribute to the consideration for the release; is not mentioned in the release; and the parties did not intend to include the railroad in the release?

2. Where the Warner Company was found to be in no way negligent and, therefore, not a tortfeasor, can a release given to such innocent party based on the law of Pennsylvania inure to the benefit of the railroad whose liability is bottomed on the Federal Employers Liability Act, where the clear intention of the parties was that the railroad should not be relieved of this liability?

3. Where the injured railroad worker settled his claim against Warner Company under the state law, does not Section 5 of the Federal Employers Liability Act preclude the railroad from evading its liability under the FELA by resort to the release which neither embraces the railroad nor its liability under the FELA?

STATUTES INVOLVED.

"CONTRACT, RULE, REGULATION, or DEVICE EXEMPTING FROM LIABILITY; SET-OFF.

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, that in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought." Apr. 22, 1908, c. 149, sec. 5, 35 Stat. 66.

STATEMENT OF THE CASE.

Petitioner, Nicola Panichella, instituted suit under the Federal Employer Liability Act (FELA), 45 U. S. C. A. 51 et seq. against his employer, the Pennsylvania Railroad Company to recover damages for injuries sustained when he fell upon a public sidewalk in Greensburg, Pa., on December 14, 1950. The railroad joined as third party defendant, Warner Brothers Pictures, Inc. (Warner), the owner-occupant of the property adjoining the sidewalk upon which the accident occurred.

Panichella was employed by the railroad as a trackman at the time of his injury. On December 13, 1950, he reported to work at 7:00 A. M. During that day he was assigned to the task of sweeping switches clean of the snow that covered the area in which he was working. As there had been a recent snowfall that had combined with the accumulation of snow left from a prior snowstorm of a few weeks, overtime work was made necessary. Following his second eight-hour shift, the plaintiff continued to work up

until the time of the accident which occurred at about 7:00 A. M. on December 14, 1950. The railroad supplied Panichella with an evening meal at the Palace Restaurant and a package lunch which he ate during the night of December 13.

On the morning of the accident at about 7:00 A. M., Panichella was directed to return to the Palace Restaurant, about a mile distant from his place of work, for the purpose of having breakfast and bringing back lunch for himself and his foreman. Plaintiff at the time was in a grossly fatigued condition. While enroute, Panichella slipped and fell on the sidewalk abutting the Warner property. The condition of the sidewalk was variously described as to the ice formation upon it by witnesses in the court below.

The injury sustained by the plaintiff was a transverse fracture of the first lumbar vertebra. Hospitalization for about a month followed, and Panichella remained in a body cast for twelve weeks. He lost about six months' employment as a result of the injury, and upon return to his former work was hampered by residual pain.

Prior to the institution of the instant suit, Panichella, represented by counsel, negotiated a settlement [1] with the

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1. (App. 20a)

"General Release—Individual

"Know All Men by These Presents:

"That I, Nicholo Panichelli, residing at 409 White Street, Greensburg, Penna., being of lawful age, for the sole consideration of One Thousand Three Hundred Seventy-five and no/100 dollars ($1,375.00) to me in hand paid, receipt whereof is hereby acknowledged, have remised, released and forever discharged, and for my heirs, executors, administrators, and assigns do hereby remise, release, and forever discharge Warner Brothers Pictures, Incorporated, and his, her, their and its successors and assigns, heirs, executors, administrators, and all other persons, firms, and corporations, of and from any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damages to property, and the consequences thereof, resulting, and to result, from a certain accident which happened on or about the 14th day of December, 1950, for which I have claimed the said Warner

Travelers Insurance Company, liability carrier for Warner. The settlement called for the payment of $1,375.00 to the plaintiff. The railroad paid none of the consideration for the release; neither was it a party to the release; nor in fact was it aware of the settlement until sometime following its consummation.

At a pretrial conference, the trial court ruled that the release adverting to "Warner Brothers Pictures, Incorporated . . . and all other persons, firms, and corporations" was ambiguous insofar as it applied to the railroad. Accordingly, the court directed that a hearing be held to determine the intentions of counsel for Panichella and the representative of Warner at the time the settlement was negotiated. At this hearing, the negotiating parties made it manifestly clear that their intention was to release only the Warner Company from liability, and that they had no such intention as to the Pennsylvania Railroad See *infra*, pp. 11a-18a). The trial court, positing its decision upon this expression of intention, the fact that the railroad was not cognizant of the release and the fact that the railroad paid no consideration to Panichella ruled as a matter of law that the negotiating parties had no intention of releasing the railroad, but intended approximately and specifically to release Warner and any person, firm or corporation connected with or related to Warner. Therefore, the trial court denied the railroad's motion for a directed verdict, which motion was based in its entirety upon the release.

The jury, upon trial of the case, returned special findings as follows: The railroad was 55% negligent; the plaintiff was 45% contributorily negligent; damages were in the amount of $30,000; and Warner was not guilty of negli-

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Brothers Pictures, Incorporated, to be legally liable, which liability is hereby expressly denied.

"IN WITNESS WHEREOF, I have hereunto set my hand and seal the 28th day of October in the year one thousand nine hundred fifty-two (1952).

(Sgd.) NICHOLO PANICHELLI
Nicholo Panichelli."

gence. Judgment, therefore, was entered in favor of Panichella for $16,500.00, and credit subsequently allowed for $1,375.00, the amount Panichella received from Traveler's Insurance, as consideration for the release to Warner. The railroad's motion for judgment n.o.v. of new trial was denied (167 F. Supp. 345 (W. D. Pa., 1958)).

The appeal followed. The main contention of the railroad was that the trial court erred in failing to hold the release obtained by Travelers on behalf of Warner as including the railroad within its scope and inuring to the benefit of the railroad, thereby precluding recovery against the railroad under the FELA. Without proffering its rationale, the Court of Appeals ruled as a matter of law that the release included the railroad within its protective orbit and, accordingly, reversed the lower court (268 F. 2d 72 (3 Cir., 1959)).

Such finding was in error in that: (1) it deprived plaintiff of his fundamental right to a trial by jury; (2) it gave an improper legal effect to the release in question; and (3) it was repugnant to the general philosophy of the FELA and the general policy espoused in Section 5 of that Act. 45 U. S. C. 55.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

First Point: The Decision of the Court Below Violates the Rule of General Application in the Federal Courts That Where a Release Is Ambiguous and the Parties Have Expressed Their Intention as to the Release, a Question of Fact Arises Which Is for Jury Determination. In This Regard the Decision of the Court of Appeals Is in Conflict With the Opinion of This Court in Dice v. Akron, etc., 342 U.S. 359 (1951); and Callen v. Pa. R. Co., 332 U.S. 625 (1947), and the Opinion of the Court of Appeals for the District of Columbia in McKenna v. Austin, 134 F.2d 659 (1943).

Under the FELA, the construction of a release is governed by federal law, which has long recognized the established rule that the construction of a release as to the intent of the parties presents a question of fact to be determined from the surrounding conditions and circumstances construed with reference to the amount of consideration paid and the language of the release employed. See *Dice v. Akron C. & Y. R. Co.*, 342 U. S. 359 (1951); *Ricketts v. Pa. R. Co.*, 153 F. 2d 757 (2 Cir., 1946); *Callen v. Pa. R. Co.*, 332 U. S. 625 (1947).

As was stated, at the pretrial conference the trial court ruled that the release was ambiguous and ordered a hearing on the factual issue of the intention of Panichella's counsel and the Warner representative at the time of the settlement. The court, having heard the testimony of the parties and having had the opportunity of thereby fully evaluating it in relation to the circumstances surrounding the release, determined that the non-existence of any evidence indicating an intention of the parties to relieve the railroad of liability left nothing for the jury to decide in this regard. Accordingly, it construed this admittedly am-

biguous instrument to be ineffective as a bar to plaintiff's claim against the railroad under the FELA. The railroad contended that the release was unambiguous; however, its prime argument was that this was not a question for the court's determination but was instead a question of fact for the jury.

The Court of Appeals, apparently, disagreed with the interpretation placed by the district court on the testimony of intention and the language of the instrument. However, the real issue before the Court of Appeals in this regard was not whether that tribunal agreed or disagreed with the trial court's interpretation of the intention of the parties. Rather, the issue was whether or not there was a sufficient question of fact to be presented to the jury. The mere fact of disagreement between the tribunals is in itself an indication of the ambiguous nature of the instrument. At any rate, the language of the release, in view of the location of the clause "all other persons, firms and corporations" in immediate alliance of interest with Warner, and the absence in the release of any other words discharging persons in Warner's employ or in other association with Warner, could not be termed as unambiguous. The Court of Appeals, therefore, if it disagreed with the result reached by the trial court should properly have remanded the case to the district court for jury determination as to the intention of the parties. Cf. *Byrd v. Blue Ridge Rural Electric Company*, 356 U. S. 525. Its failure to so act deprived the plaintiff of its right to trial by jury on this most important issue of the case.

In *Dice v. Akron C. & Y. R. Co.*, 342 U. S. 359, wherein the Ohio Supreme Court ruled as a matter of law that a release was invalid, this court stated (p. 362):

> "Releases and other devices designed to liquidate or defeat injured employees' claims play an important part in the federal act's administration. Compare Duncan v. Thompson, 315 US 1, 86 L ed 575, 62 S Ct 422. Their validity is but one of the many interrelated

questions that must constantly be determined in these cases according to a uniform federal law.

* * *

"We have previously held that 'The right to trial by jury is "a basic and fundamental feature of our system of federal jurisprudence" ' and that it is 'part and parcel of the remedy afforded railroad workers under the Employers Liability Act.' Bailey v. Central Vermont R. Co., 319 US 350, 354, 87 L ed 1444, 1447, 63 S Ct 1062. We also recognized in that case that to deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence 'is to take away a goodly portion of the relief which Congress has afforded them.' It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' ".

And, again, in *Callen v. Pa. R. Co.*, 332 U. S. 625, this court emphasized the importance of jury fact finding as to the validity of releases in FELA cases when it stated at page 628:

"The Circuit Court of Appeals, quite rightly we think, construed the charge of the District Judge as withdrawing the question of validity of the release from the jury and said: 'This was palpable error under the facts relating to the release and entirely aside from the Court's incorrect assumption that there was no dispute about the permanency of the injuries.'

* * *

(p. 629)

"We think the defendant was entitled to argue these contentions to the jury and to have them submitted under proper instructions.

* * *

". . . The Court of Appeals was right in holding that failure to submit this latter question to the jury was reversible error."

In *Byrd v. Blue Ridge Rural Electric Corp.*, 356 U. S. 525, this court again emphasized the importance of submission of factual issues to the jury. While jurisdiction in the *Byrd* case was based upon diversity of citizenship and therefore this court did not feel constrained to be bound by the strict policy of jury determination of factual issues required under the FELA, still where the issue was whether the Court of Appeals erred in directing judgment for respondent without remand to allow the jury to rule on the question, this court stated (pp. 536-537):

"The situation is therefore not analogous to that in Dice v. Akron C. & Y.R. Co., 342 US 359, 96 L ed 398, 72 S Ct 312, where this Court held that the right to trial by jury is so substantial a part of the cause of action created by the Federal Employers' Liability Act that the Ohio courts could not apply, in an action under that statute, the Ohio rule that the question of fraudulent release was for determination by a judge rather than by a jury.

* * *

"But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. Jacob v. New York, 315 US 752, 86 L ed 1166, 62 S Ct 854."

Second Point: The Decision of the Court Below Violates the Rule That Where a Release Is Given to an Innocent Party, That Release Cannot Inure to the Benefit of a Guilty Tortfeasor. In This Regard, the Decision of the Court of Appeals Is in Direct Conflict With the Opinions of the Courts of Appeals in The Ross Coddington, 6 F. 2d 191 (2 Cir., 1951); Pittsburgh Ry. Co. v. Chapman, 145 F. 886 (3 Cir., 1906); and Huskie Refining Co. v. Barnes, 119 F. 2d 715 (9 Cir., 1941).

The fact that the release under construction did not expressly reserve Panichella's rights against the railroad does in no way militate against the strict requirement in FELA Cases that the interpretation of this release be for the jury. We are not here faced with a joint tortfeasor situation wherein a release given to one party operates to release all others jointly responsible for the injury sustained. Cf. *Dura Electric Lamp Co. v. Westinghouse Electric Corp.*, 249 F. 2d 5 (3 Cir., 1957), cited by the court below. As was indicated, the jury in the case at bar found that Warner was in no way negligent. Therefore, since Warner was not a tortfeasor, this is not a joint tortfeasor situation, and the release to Warner cannot inure to the benefit of the railroad.

The notion that a release to one of two joint tortfeasors necessarily released the other had its genesis in the rule that since there was but one cause of action against the two, a release to one necessarily surrendered all rights against the other. However, the application of this precept is dependent upon a finding of joint tortfeasors, for where the wrongful act is not done jointly, the resultant debt or liability is the debt of one or the other, and the settlement with and discharge of one cannot affect the cause of action

against the other. In other words, unless the party released is liable, the consideration for the release is not to be regarded as a satisfaction and, therefore, the case does not fall within the rule that an injured party can recover but one satisfaction.

Thus, in *The Ross Coddington*, 6 F. 2d 191 (2 Cir., 1925), wherein a release to an innocent party was raised as a defense by the tortfeasor, the court ruled that the defense was unavailable and stated (p. 192):

> "But the defense is unavailable on a broader ground, viz. the Great Lakes Company and the tug were not joint tort-feasors. That phrase always implies some sort of community in wrongdoing, and such community is wholly absent here, first, because Great Lakes Company did no wrong at all; and, secondly, because the sole reason alleged in the libel for this suit, or discoverable therefor in the evidence, is the failure of the tug to make fast to the lighter before Cunningham was permitted to try to leave the tug. There was no community of action about this. The lighter was not moving, had nothing to do, and did it. We overrule the first defense."

And again in *Pittsburgh Ry. Co. v. Chapman*, 145 F. 886 (3 Cir., 1906) it was stated at page 891:

> "'Neither the pleadings or the evidence averred or showed any joint negligence or joint liability of the defendant the Baltimore & Ohio Railroad Company. The negligence of the defendant averred in the statement and established by the proof was the act of placing its wires an unsafe distance above the railroad tracks. This was a positive act of commission in the doing of which the Baltimore & Ohio Railroad Company had no part. It may be the latter company was also liable to the plaintiff in failing to notify him of

the presence of the wire, but such liability, if it existed, is based on different grounds, namely, a negative act of omission by the railroad and not a positive act of commission. *It suffices to say that it is not shown th. Baltimore & Ohio Railroad Company was liable as a joint tort feasor, and in the absence of such proof, the burden of showing which is on the defendant, a release of the Baltimore & Ohio Railroad Company by the plaintiff did not release the defendant. Thomas. v. Railroad Company*, 194 Pa. 544, 45 Atl. 344.' " (Emphasis added.)

See also *Huskie Refining Co. v. Barnes*, 119 F. 2d 715 (9 Cir., 1941), and cf. *U. S. Ex Rel Marcus v. Hess*, 154 F. 2d 291 (3 Cir., 1946), wherein it was held that under federal law relating to joint tortfeasors, the release of those defendants who contributed payment of a portion of the judgment does not release non-contributing defendants.

What is more, were this a case of joint tortfeasors, which it clearly is not, still the factual issue as to the intention of the parties would be required to be submitted to the jury. For, in this case, the more enlightened authority has espoused the desirable doctrine that a plaintiff should never be compelled to surrender his cause of action against any wrongdoer unless he has intentionally done so or unless he has received such full compensation that he is no longer entitled to maintain such cause of action. Thus, where there has been full satisfaction, it would follow that no claim should remain as to any other tortfeasor—but, whether or not there has been full satisfaction is normally to be determined by the jury, where the amount of the claim is unliquidated. See Prosser Torts, page 1111 (1941).

So, in the oft-cited and favorably received opinion of *McKenna v. Austin, etc.*, 134 F. 2d 659 (D. C. Cir., 1943), then Judge Rutledge, later Mr. Justice Rutledge, stated in this regard (p. 662):

"The rule's results are incongruous. More often than otherwise they are unjust and unintended. Wrongdoers who do not make or share in making reparation are discharged, while one willing to bear the wrong and no more guilty bears the whole loss. Compromise is stifled, first, by inviting all to wait for the others to settle and, second, because claimants cannot accept less than full indemnity from one when doing that discharges all. Many, not knowing this, accept less only to find later they have walked into a trap. The rule shortchanges the claimant or overcharges the person who settles, as the recurring volume and pattern of litigation show. Finally, it is anomalous in legal theory, giving tortfeasors an advantage wholly inconsistent with the nature of their liability.

* * *

(p. 664)

"The difficulty is in how it shall be determined whether full indemnity has been received. This will vary with circumstances. Facts and intentions, rather than presumptions from the mere fact of settlement, should control. When damage to property is measurable with fair accuracy and has reasonable relation to the damage shown, the amount paid may be conclusive. With personal and other injuries less readily reduced to cash value the difficulty may be greater. Ordinarily the claimant will not secure complete indemnity from one or less than all, unless the others are judgment proof. Such a settlement usually would not be advantageous to the settling wrongdoer. The presumption of fact therefore generally would be against full satisfaction and discharge. It would seem conclusive when rights against those not released are reserved explicitly or intention otherwise appears to keep

these claims alive. *Whether the settlement is made and accepted as full satisfaction or merely as the best obtainable compromise for the settler's liability is the crucial issue and ordinarily one of fact.*

• • •

(p. 665.)

". . . . Whether or not the settlement amounts to full reparation is to be determined, not merely from the fact of settlement, but as the facts of the particular situation dictate. Partial satisfaction taken in compromise and release of liability of one or some of the wrongdoers does not discharge the others." (Emphasis added.)

Thus, were this a case of joint tortfeasors, the concepts set forth in *McKenna* would require the submission of the issue to the jury.

Panichella and Warner negotiated their settlement in the context of the law of Pennsylvania, under which law contributory negligence is an absolute bar to recovery in any cause of action. As is indicated, the jury in the case at bar found Panichella 45% contributorily negligent. It was obvious, therefore, that the acceptance of $1,375.00 for an injury as serious and debilitating as that at bar was made with full view of the absolute bar facing the plaintiff under Pennsylvania law (*infra*, p. 12a). The same impediment to recovery was not existent under the FELA. Thus, it is clear that under the rule of the *McKenna* case, the settlement was not accepted as full satisfaction for plaintiff's damages, but was designed merely to obtain from Warner that which he could and preserve plaintiff's federally-created right against the railroad.

It would, therefore, appear that the action of the appellate court cannot be condoned on either the theory that

the release factually included the Pennsylvania Railroad within its scope, or that the release to Warner Brothers inured to the benefit of the Pennsylvania Railroad on concepts of joint tortfeasor adjustments.

Third Point: The Decision of the Court Below Is Repugnant to the General Philosophy of the FELA and Its Policy Espoused in Section 5 of That Act.

While plaintiff's cause of action against the Warner Company was bottomed upon the law of Pennsylvania, plaintiff here sues upon a federally-created theory of liability formulated by Congress to elevate the standard of employee protection and to enlarge the rights of the injured workmen. 60 Congressional Record 4530. In order to assure the effectuation of this humanitarian and liberal policy, Congress took great pains to strike down those efforts on the part of common carriers which resulted in their exemption from liability under the FELA. This effort manifested itself in Section 5 of the FELA.

It is clear from the Congressional Committee hearings and the reports on the Federal Employers' Liability Act that Congress wanted Section 5 to have the full effect of its comprehensive phraseology applied. Section 3 of the first Federal Employers' Liability Act passed by Congress in 1906 provided that:

> "No contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee. . . ."

In the amendment process of the FELA, disfavor with the restrictive aspects of the original Section 3 of the Act

was indicated when the language which is presently included in Section 5 of the Act was introduced for the first time. Section 3 was incorporated verbatim in one of the two bills introduced in the Senate, but it was the bill containing the broader language of the present Section 5 that survived consideration. See Hearing on S-3080, February 20, 1908, p. 3, and cf. Senate Report No. 460, 60th Cong., 1st Sess., p. 4. Without more, the change from "contract" to "any contract, rule, regulation or device whatsoever" would seem to indicate the dissatisfaction of the legislature with the restrictive nature of the original enactment. See *Duncan v. Thompson*, 315 U. S. 2.

In *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, the court referred to Section 5 as follows (p. 611):

> "The evident purpose of Congress was to enlarge the scope of the section and to make it more comprehensive by a generic, rather than a specific, description. It thus brings within its purview 'any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act.' It includes every variety of agreement or arrangement of this nature. . . . ."

It would appear that Section 5 would seem to be an enlargement ample to include the situation at bar. As was stated, the railroad was not a party to the release. The testimony of the negotiating parties amply indicates that they had no intention to release the railroad of liability. The railroad contributed nothing to the release. Perhaps, most important is the fact that the release was entered into with a non-railroad defendant on the basis of Pennsylvania law for a minimal sum in view of the injury sustained because of the stringent application of contributory negligence in that forum. Certainly, it cannot be contended that the

minimal sum obtained from Warner in any way approximates the full and adequate compensation which the proponents of the Act intended.

Under such circumstances, to permit the railroad, a complete stranger to the settlement transaction, who had contributed nothing to the fund, to defeat plaintiff's claim under the FELA, permits the railroad to employ a contract or device to exempt itself from liability, in violation of Section 5.

The case of *Callen v. Pa. R. Co.*, 332 U. S. 625, supports this position rather than militates against it. The court in *Callen* ruled that Section 5 which was designed to prevent the use of any contract or device to exempt the carrier from liability did not forbid a bona fide settlement *between the railroad and its injured employee for a full compromise.* The court made this determination because it felt that a settlement was not an attempt to avoid liability, but was merely a compromise of claims. Here, as distinguished from the *Callen* case, the Pennsylvania Railroad is not attempting to compromise a claimed liability but rather is using the release in order to exempt itself from its federally-created responsibility. Such action is specifically repugnant to Section 5.

While, as was stated, there are no federal cases dealing with the specific situation at bar, the courts have in other instances indicated the pervasive scope of that provision. Thus, in *Boyd v. Grand Trunk Western R. Co.*, 338 U. S. 263, where the employer entered into a contract with an employee which contract did not exempt the employer from liability but merely limited the employee's choice of forum, the court struck such provision down, stating (pp. 265-266):

> "We hold that petitioner's right to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of Sec. 5 of the Liability Act: 'Any contract, rule, regu-

lation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void. . . .' The contract before us is therefore void.

"Any other result would be inconsistent with Duncan v. Thompson, 315 US 1, L ed 575, 62 S Ct 422 (1942). That opinion reviewed the legislative history and concluded that 'Congress wanted Sec. 5 to have the full effect that its comprehensive phraseology implies.' 315 US at 6, 86 L ed 578, 62 S Ct 422. In that case as in this, the contract before the Court was signed after the injury occurred."

And, in *Duncan v. Thompson*, *supra*, where a contract was entered into subsequent to the injury whereby the injured railroad employee agreed, in consideration of a payment made to him by his employer for living and other expenses, that if his claim should not be adjusted by negotiations and he should elect to bring suit, a return of the amount paid should be a prerequisite to the failing and maintenance of any such suit, this court held that such agreement was in violation of Section 5 of the Act. In so doing, the court stated (p. 7):

"The respondent contends, however, that Sec. 5 does not invalidate compromises of disputed claims, and that the agreement here is in the nature of a conditional compromise. We need not here determine what limitations, if any, Sec. 5 places upon the validity of agreements not to sue if made in consideration of a bona fide compromise and settlement of claims arising under the act, because the very language of the agreement indicates that it is not a compromise and settlement."

Here, as in the Duncan case, we are not faced with a compromise and settlement and, therefore, the attempt to delimit the employee's rights against the railroad are ineffective as violative of Section 5.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
JAMES P. MCARDLE,
MARVIN I. BARISH,
JOHN DE MAY,
GENE K. LYNCH,
Counsel for Petitioner.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,810

NICOLA PANICHELLA

v.

PENNSYLVANIA RAILROAD COMPANY,
Appellant,

v.

WARNER BROTHERS PICTURES, INC.,
Third-Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Argued May 5, 1959

Before McLAUGHLIN, KALODNER and STALEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed June 12, 1959)

By STALEY, *Circuit Judge.*

The question posed by this appeal is a narrow one. Is a clear and precise release executed by a railroad employee

discharging a named party and all other persons, firms and corporations of and from any and all claims, demands, rights and causes of action whatsoever arising by reason of a specific accident effective to bar the employee's action under the Federal Employers' Liability Act (FELA), 45 U.S.C.A. § 51 et seq., against his employer-railroad for damages sustained in the same accident described in the release?

Plaintiff, Nicola Panichella, brought the action below under the FELA against the defendant-railroad to recover damages for injuries sustained when he fell upon a public sidewalk in Greensburg, Pennsylvania, on December 14, 1950. The railroad filed an answer and joined as third-party defendant Warner Brothers Pictures, Inc., the owner-occupant of the property adjoining the sidewalk upon which the accident occurred.

Plaintiff was employed by the railroad as a trackman and on December 13, 1950, reported for work at 7:00 a.m. During the day he was assigned to sweeping switches clean of the snow that covered the area. There had been a recent snowfall that, combined with the accumulation from a severe snow storm of a few weeks earlier, necessitated overtime work. As a result of his seniority, plaintiff was given an opportunity to volunteer for overtime work, which he did. Following his second eight-hour shift, the plaintiff continued to work up until the time the accident occurred at approximately 7:00 a.m. December 14, 1950. The railroad supplied plaintiff an evening meal at the Palace Restaurant and a packaged lunch which he ate during the night of December 13.

The following morning at about 7:00 a.m. plaintiff was directed to return to the same restaurant, about a mile distant from his place of work, for the purpose of having breakfast and bringing back lunch for himself and his foreman. To reach the restaurant he had to walk through a public park and along public sidewalks. While en route plaintiff slipped and fell on the sidewalk abutting the

Warner property. The condition of the sidewalk was variously described as rough ice topped with light snow; ice in ridges, wavy-like and a little rough; and as covered with a very thin slush. There had been some overnight snowfall.

The injury sustained by the plaintiff was a transverse fracture of the first lumbar vertebra. Hospitalization for about a month followed, and plaintiff remained in a body cast for twelve weeks. He lost about six months employment as a result of the injury and upon return to his former work claimed residual pain. At the time of trial plaintiff was 65 years of age.

Prior to the institution of the instant action, plaintiff engaged an Irwin, Pennsylvania, attorney to represent him. The attorney negotiated a settlement with The Travelers Insurance Company, liability carrier for Warner. The settlement called for payment of $1,375, and prior to execution of the release it was explained to plaintiff by his attorney. It was executed on October 28, 1952, twenty-two months after the accident. The railroad paid none of the consideration for the release, and was not a party to it, nor in fact was it aware of the settlement until November 4, 1952.

At the trial, both the railroad and the third-party defendant relied upon the release, which is set forth in the margin.[1] After some deliberation, the trial court concluded

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1. "General Release—Individual

"Know All Men by These Presents:

"That I, Nicholo Panichelli, residing at 409 White Street, Greensburg, Penna., being of lawful age, for the sole consideration of One thousand three hundred seventy five & no dollars ($1,375.00) to me in hand paid, receipt whereof is hereby acknowledged, have remised, released, and forever discharged, and for my heirs, executors, administrators, and assigns do hereby remise, release, and forever discharge Warner Brothers Pictures, Incorporated and his, her, their, and its successors and assigns, heirs, executors, administrators, and all other persons, firms, and corporations, of and from any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property,

that the release was clear and unambiguous and to be construed as a matter of law, and the jury was never advised of its existence. The court denied the railroad's motion for directed verdict. The jury returned special findings as follows: the railroad was 55% negligent; plaintiff was 45% negligent; damages were in the amount of $30,000; Warner was not guilty of negligence which was the proximate cause of the accident. Accordingly, judgment was entered in favor of the plaintiff in the amount of $16,500 and credit subsequently allowed for $1,375, the amount plaintiff received from Travelers in consideration for the release to Warner. The railroad's motions for judgment n.o.v. or a new trial were denied.[2]

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and the consequences thereof, resulting, and to result, from a certain accident which happened on or about the 14th day of December 1950, for which I have claimed the said Warner Brothers Pictures, Incorporated to be legally liable, which liability is hereby expressly denied.

"IN WITNESS WHEREOF, I have hereunto set my hand and seal the 28th day of October in the year one thousand nine hundred fifty-two (1952).

"Sealed and delivered in the presence of

[Sgd.] NICHOLO PANICHELLI
Nicholo Panichelli

"Witness [Sgd.] MAX M. BERGAD
Address Irwin Pa.
Witness [Sgd.] EDMUND J. McDONALD
Address 309 Main St., Irwin Pa.

"STATE OF PENNSYLVANIA } ss.
COUNTY OF WESTMORELAND }

"On this 28th day of October 1952 before me personally appeared Nicholo Panichelli to me known, and known to me to be the same person described in and who executed the above instrument and he (or she) acknowledged to me that he (or she) executed the same.

[Sgd.] EDMUND J. McDONALD
Justice of the Peace
My Commission Expires First Monday in January, 1958"
(SEAL)

The difference in spelling of the plaintiff's name in the release and in the caption of the case is of no significance.

2. Panichella v. Pennsylvania Railroad Co., 167 F. Supp. 345 (W. D. Pa. 1958).

The main contention of the defendant-railroad on this appeal is that the trial court erred in failing to hold that the release obtained by Travelers Insurance Company, on behalf of Warner, inured to its benefit and therefore precluded recovery. Plaintiff, while admitting the validity of the release as such, contends that the railroad's attempt to utilize or gain the benefit of the release is an artifice and prohibited by Section 5 of the Act of April 22, 1908, 35 Stat. 66, 45 U.S.C.A. § 55.[3]

Although the railroad has expressed some doubt as to whether federal or state law should apply in regard to the effect of this release, we agree with the plaintiff that this is a case for the application of federal law. The right was created by federal law, and whether subsequent acts of the plaintiff have extinguished it should be determined by federal law. As the Supreme Court stated when considering this question in South Buffalo Railway Co. v. Ahern, 344 U.S. 367, 372 (1953), "* * * peculiarities of local law may not gnaw at rights rooted in federal legislation." This admonition is especially apropos in considering rights granted to railroad employees by Congress under the FELA. Also see Dice v. Akron, C. & Y. R.R.Co., 342 U.S. 359 (1952).

As the plaintiff readily admits, Section 5 of the Act of April 22, 1908, was never intended to forbid bona fide agreements of release. The Supreme Court considered an attack upon releases per se in Callen v. Pennsylvania R.R.Co., 332

3. "Contract, Rule, Regulation, or Device Exempting from Liability; Set-off.

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought." 45 U. S. C. A. § 55.

U.S. 625, 631 (1948), and held that "* * * a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation." Accord, South Buffalo Railway Co. v. Ahern, supra; cf. Dura Electric Lamp Co. v. Westinghouse Electric Corp., 249 F.2d 5 (C.A.3, 1957).

The release in question is conceded to be bona fide in and of itself. The plaintiff could hardly contend otherwise, for it was negotiated by his then attorney, for a substantial consideration, twenty-two months after the accident, signed only after a thorough explanation by his attorney and a complete disclosure by Travelers Insurance Company of its contents. There has been no allegation of overreaching and none can be discerned.

However, plaintiff contends that although a bona fide release negotiated and paid for by a railroad is a valid defense in an FELA case, the use of an admittedly bona fide release not obtained by the railroad and not paid for by it is invalid under the terms of Section 5 of the Act of April 22, 1908. He admits that the broad terms of the release would cover the railroad but contends that its use of it, without any connivance or agreement with Warner whatsoever, is a prohibited artifice. We fail to discern the rationality of this argument, for it was the act of the employee who voluntarily, knowingly, and advisedly entered into the release which extinguished his rights and not any act of the railroad. The railroad merely brought the fact of the release to the attention of the court in order to have the law operate thereon. In effect this is no different than the act of the railroad in bringing to the attention of the court a release it had negotiated. Assuming a bona fide release in either case, there is no artifice. It is indeed far-fetched to contend that the mere act of bringing to the attention of a court facts which are relevant to the defense of a suit is an artifice.

The only other case in which this problem has been considered, Falco v. Pennsylvania R.R.Co., 202 Misc. 769, 109 N.Y.S. 2d 279 (1951), concluded that since a general release to the employer-railroad is not proscribed, the reasoning underlying that holding is even more cogent when the employer is not a party to the release. For, in the latter case, there is less danger that the disparity of bargaining power will adversely affect the negotiation.

The judgment in the main action will be reversed.

Appeal was also taken by the railroad from the judgment in favor of the third-party defendant. In view of what we have heretofore said, the judgment in favor of Warner Brothers Pictures, Inc., will be affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 12,810.

NICOLA PANICHELLA

v.

PENNSYLVANIA RAILROAD COMPANY,
A CORPORATION,
Appellant.

v.

WARNER BROTHERS PICTURES, INC.,
A CORPORATION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Present: McLAUGHLIN, KALODNER and STALEY, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of October 23, 1958 in favor of plaintiff and against defendant be, and the same is hereby reversed, with costs; and the judgment of October 23, 1958 in favor of the third-party defendant against the third-party plaintiff be, and the same is hereby affirmed, with costs.

By THE COURT,

STALEY,
Circuit Judge.

June 12, 1959.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 12,810.

NICOLA PANICHELLA

v.

PENNSYLVANIA RAILROAD COMPANY,
Appellant,

v.

WARNER BROTHERS PICTURES, INC.,
Third-Party Defendant.

SUR PETITION FOR REHEARING.

Present: McLAUGHLIN, KALODNER and STALEY, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT:

s/ STALEY.

Dated: July 14, 1959.

SUPREME COURT OF THE UNITED STATES.

No. , October Term, 1959.

NICOLA PANICHELLA,
Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 13, 1959.

(S) WILLIAM J. BRENNAN, JR.,
Associate Justice of the Supreme Court of the United States.

Dated this 7th day of October 1959.

EXCERPTS FROM PROCEEDINGS AT HEARING ON MOTION FOR SUMMARY JUDGMENT.

(22) * MAX BERGAD, called as a witness by the court, being first duly sworn testified as follows:

* * *

(24) By the Court:

Q. Will you state your full name for the record, sir.

A. Max M. Bergad, B-e-r-g-a-d.

Q. Your business or profession.

A. Member of the bar practicing in Westmoreland County, and also a member of this court.

Q. For how any years, sir?

A. Since 1927.

Q. In connection with the practice of your profession did you come to know Nicola Panichella?

A. I did, sir.

Q. Will you state the circumstances generally under which you came to know him?

A. Mr. Panichella consulted me in my Irwin office where I reside, and also have an office, about a claim that he had against the Pennsylvania Railroad, and told me the circumstances of his being injured on—that would be December

Q. To refresh your memory, the date of the accident—what was it, gentlemen?

(25) A. That was December 14, 1950, and the accident occurred on West Pittsburgh Street on the north side of said street on which the Warner Bros. Theater is located.

Q. Did you enter into a contract with him; did you have a written agreement with him?

A. I don't think I did, your Honor.

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* Figures in parentheses refer to page numbers of typewritten transcript.

Q. Now after you were consulted by him, did you have any communication with the Pennsylvania Railroad and/or Warner Bros. Pictures in connection with compromise of the matter?

A. I called on a Mr. Lawson, whose first name I don't know off-hand. I called on him at his Pittsburgh office on two or three occasions, and notified by letter the Warner Bros. Theater Company pursuant to which James Bridgeman—that is B-r-i-d-g-e-m-a-n—insurance adjustor for Travelers Insurance Company called upon me. I went into the matter of the liability of the Pennsylvania Railroad, and examined cases and the like. I tried to effect a settlement with him, that is with Mr. Lawson, and to the best of my recollection the position of the Pennsylvania Railroad as told to me by Mr. Lawson, that they disclaimed any liability.

• • •

(26) A. The conclusion I reached after at least three meetings in conference with Mr. Lawson was that Pennsylvania Railroad Company was not liable and that they would pay nothing. Then I had a number of interviews with Mr. Bridgeman, the insurance adjustor for Travelers Insurance Company. I tried to locate witnesses who might be helpful in pursuing the claim of Mr. Panichella, and after investigation and after consulting with Mr. Panichella, who was always accompanied by an elder son as I recall, this settlement was concluded. It was satisfactory to him, and his son came with him, and based upon my investigation of the law and the facts, it was also that question of negligence, (27) question of contributory negligence I should say, and the settlement was concluded and the release, copy of which I have, was executed. I don't know who the witnesses are because my copy is not witnessed.

Q. Your name is on as witness plus an Edmund J. McDonald.

A. Yes, he is a member, he is a justice of the peace out in the borough of Irwin.

Q. Your name is Max?

A. That is right, sir. To the best of my knowledge the Pennsylvania Railroad Company, that is Mr. Lawson, their claims adjustor or whatever he was, was not advised one way or another about the settlement, about the execution of the release, nor did he ever write me about any possible outcome of negotiations that I had with Travelers Insurance Company.

* * *

(28) Q. What was your intention when you authorized your client to sign the release, in which the release says "We do hereby remise, release and discharge Warner Bros. Pictures and all other persons, firms and corporations of, and from any and all claims, demands, rights and causes of action whatsoever, kind and nature arising from and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries," so forth and so on. Why did you authorize your client to sign a release releasing persons other than Warner Bros.?

* * *

Q: Did you see this release before Nicola Panichella signed it?

(29) A. Yes, I did, your Honor.

Q. Did you recommend that he sign it?

A. I explained it to him thoroughly, your Honor, and asked him if he was satisfied with the settlement, and he executed it and was satisfied at that time.

Q. Then I ask you, why did you authorize Nicola Panichella to sign a release in which Panichella was releasing all persons other than Warner Bros., when you were not dealing with any person other than Warner Bros. when the release was signed?

A. Your Honor, I will try to answer your question this way. The release, copy of which I have in my hand, is a

general release which is prepared by insurance companies and lawyers for a claimant. At least in all the experience I have had, I have never prepared a release. A release was prepared. When this release was presented to me for reading, approval, and approval by my client, there was only one thought in mind, and that was to release Warner Bros. Pictures, Incorporated, who was represented by Travelers Insurance Company, its agent; to release that company, and the language which goes on to say other persons, firms and corporations, couldn't possibly include any other corporation such as Pennsylvania Railroad, and if there is a general reference to a corporation, it would have to be somebody who may have had an interest in (30) that particular building that——

Q. Warner Bros.?

A. Warner Bros. Building, that's right.

Q. Then to recapitulate, as I understand it, when you read this release and advised your client Nicola Panichella to sign it, it was your intention and the basis that you approved that he do sign, that you were releasing Warner Bros. Pictures, Incorporated, and any other person or persons that had any connection directly or indirectly with the liability Warner Bros. Pictures might have had?

A. That is absolutely correct.

Q. It was not your intention to release any person other than Warner Bros. Pictures, Incorporated, and any person who might directly or indirectly have liability based on the fact that the plaintiff fell in front of Warner Bros. Pictures, Incorporated; is that correct?

A. That is right.

Q. It was not your intention to release, when you advised him to sign it, Pennsylvania Railroad in any way whatsoever?

A. That is right.

* * *

(41) JAMES G. BRIDGEMAN, called as a witness by the court, being first duly sworn testified as follows:

* * *

(43) By The Court:

Q. Will you state your full name for the record.

A. James G. Bridgeman.

Q. What, sir, was your connection direct or indirectly with the Warner Bros. Pictures, Inc., in the years 1950 through '52?

A. I was employed by the Travelers Insurance Company as an insurance adjustor and claims adjustor, and the Travelers Insurance Company was insurance carrier for the Warner Bros. Pictures, Inc.

* * *

Q. Now will you state, sir, the circumstances under which the release was executed by Mr. Panichella in which he released Warner Bros. Pictures and all other persons, firms and corporations, from all claims?

A. Well, after considerable investigation, and after quite a (44) few conferences and negotiations with Attorney Max Bergad, a settlement figure was reached between myself and the attorney. I submitted a release to the attorney to have his client execute, following which I would issue a draft for the consideration listed thereon.

Q. Was the Pennsylvania Railroad consulted by you before this settlement was made, or did you consult any representative of the Pennsylvania Railroad?

A. I did not personally, sir.

* * *

(45) Q. Why did you present a release on behalf of the liability insurance carrier for Warner Bros. Inc., which released all other persons, firms and corporations of and from any and all claims and demands, et cetera and so on, other than Warner Bros. Pictures, Inc.? What did you have in mind, what were you trying to do?

A. Your Honor, I must explain that I am a layman, I am not an attorney.

Q. How long had you worked for Travelers Insurance before October 28, 1952?

A. I was employed March 10th, 1947.

Q. How many claims had you adjusted with this type of release between '47 and '52?

(46) A. I would imagine an average of ten a month, sir.

Q. About then, about five or 600 cases?

A. I suppose so.

Q. Did you use this release in those five or 600 cases, this form of release?

A. That release or one very similar.

Q. You were fully acquainted as to the terms and provisions of the release?

A. Yes, your Honor.

Q. Why did you use a release in this case that released some other person other than Warner Bros.?

A. This is the standard printed release form, drawn up by the legal department of our company, which was recommended to me by my superiors to be used to settle this type of claim.

Q. Who did you have in mind releasing besides Warner Bros.?

A. I had in mind releasing no one in particular except our policy holder, whom I intended to release from any and all claims.

Q. Who was that?

A. Warner Pictures, Inc.

Q. Was it your intention then to release Pennsylvania Railroad also or not to release them also when you had the release signed?

A. I would not say I had any affirmative or negative intentions as far as Pennsylvania Railroad was concerned.

Q. In reaching a settlement figure, was or was not Pennsylvania (47) Railroad Company's interests considered in any way whatsoever?

A. I don't understand that question, your Honor. Could you rephrase it?

A. You arrived at a figure of $1375. My question is, in reaching that figure, did you or did you not consider the interests of Pennsylvania Railroad in arriving at that figure?

A. No, your Honor.

Q. You did not?

A. No, your Honor.

Q. Then do I understand correctly on behalf of your client it was not your intention to release Pennsylvania Railroad or to protect their interests?

Mr. Rhodes: I want to object to that. The witness has stated that he had neither an affirmative nor a negative intention in that regard. I don't think it is proper to cross-examine this witness.

The Court: The exception is so noted. I am interested in getting facts; I don't care who it hurts or helps.

Q. As I understand you—if I am wrong please correct me—when this release was executed by Nicola Panichella, which brought about paying him $1375, it was not your intention to protect Pennsylvania Railroad in any way whatsoever, is that right or wrong?

(48) A. That's right. I had no active intention so far as the Pennsylvania Railroad Company is concerned in any way, shape or form.

Q. Did you have an inactive intention?

A. No, your Honor.

Q. Did you talk, discuss it with Pennsylvania Railroad after the release was executed?

A. No, your Honor.

Q. Did anyone at Pennsylvania Railroad ever discuss it with you?

A. Not that I recall.

Q. Did Pennsylvania Railroad pay any part of the consideration of $1375?

A. No, your Honor. The Travelers Insurance Company paid the entire consideration.

The Court: That is all the questions I have.

* * *